



California Fair Political Practices Commission

SUPERSEDED
by 18702.1(2)(4)

June 25, 1987

Charles F. Lawrence
901 Cragmont Avenue
Berkeley, CA 94708

Re: Your Request for Informal Assistance
Our File No. I-87-145

Dear Mr. Lawrence:

We have received your letter requesting advice on behalf of two members of the Berkeley Rent Stabilization Board, Inez Watts and Kathleen DeVries, concerning their duties under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} Your letter states only a general question; it does not seek advice concerning a specific decision pending before the Rent Stabilization Board. Therefore, we consider it to be a request for informal assistance pursuant to Regulation 18329(c) (copy enclosed).^{2/}

QUESTIONS

1. Under what circumstances may Ms. Watts, who is a landlord, participate in decisions of the Rent Stabilization Board?
2. Under what circumstances may Ms. DeVries, who is a tenant, participate in decisions of the Rent Stabilization Board?

CONCLUSIONS

1. Ms. Watts may participate in decisions of the Rent Stabilization Board which would not foreseeably and materially affect her financial interests.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise noted. Commission regulations appear at 2 California Administrative Code Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Administrative Code.

^{2/} Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

2. Ms. DeVries may participate in Rent Stabilization Board decisions unless those decisions would foreseeably and materially affect her financial interests in a manner distinguishable from the effect on tenants in general in the City of Berkeley.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. Section 87103 provides that an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of her immediate family, or on, among other interests, any real property in which the public official has a direct or indirect interest worth \$1,000 or more. (Section 87103(b).)

As members of the Rent Stabilization Board, Ms. Watts and Ms. DeVries are public officials. (Section 82048.) Accordingly, they are subject to the conflict of interest provisions of the Act. Because Ms. Watts and Ms. DeVries have different economic interests, we shall discuss each of their situations separately.

Ms. Inez Watts

Ms. Watts owns six rental units in the City of Berkeley which are regulated under the Berkeley rent control ordinance. The Rent Stabilization Board has the power to determine, arbitrate and set rent levels, whether through general or individual adjustments, for any unit which has controlled rents under any Berkeley rent ordinance. In a previous letter, No. A-87-084, we advised Ms. Watts that she must disqualify herself from participating in decisions concerning general rent adjustment formulas for rent-controlled property in Berkeley if those decisions would foreseeably and materially affect the income producing potential or fair market value of her real property. We also concluded that the general rent adjustment decisions affect landlords, such as Ms. Watts, in a manner that is distinguishable from the effect on the public generally. This conclusion was based on Regulation 18703 and the Ferraro Opinion, 4 FPPC Ops. 62 (No. 78-009, Nov. 7, 1978) (copies enclosed), and also on Section 121(3) of the Berkeley City Charter. Our previous advice to Ms. Watts is incorporated herein by reference.

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You have questioned our conclusion that rent control decisions affect Ms. Watts differently than they affect the general public. You assert in your letter that the effect of Section 121(3) of the city charter on landlord members of the Rent Stabilization Board is unclear.

Section 121(3) of the city charter provides as follows:

Owners of rental property with rents controlled by the Berkeley Ordinance shall constitute the rental industry for purposes of the Article. Tenants constitute a large and significant part of the general public. Decisions by the Board have a material financial effect on members of the rental industry different from the general public.

This charter provision is part of Measure N, which was adopted by the voters at the November 1982 municipal election. The City Attorney's analysis of the effect of this provision, as stated in the sample ballot and voter information pamphlet, was as follows:

Under current law, landlord members of the Rent Board are permitted to vote on issues which affect members of the rental industry generally. For example, landlords can vote to set the annual adjustment. The proposed Charter amendment appears to prohibit landlords from voting on this and other decisions which affect the rental industry by providing that "decisions by the Board have a material financial effect on the rental industry different from the general public."

The arguments for and against Measure N also indicate its intent was, among other things, to prohibit landlords from voting on certain rent control decisions.

In your letter, you assert that Section 121(3) of the city charter is unclear because its application to tenants who are sublessors is uncertain. You also contend that Section 121(3) conflicts with the Commission's decision in the Ferraro Opinion, supra, that landlords owning three or fewer rental units are the "public generally." These arguments are not relevant to Ms. Watts' situation.

Ms. Watts is the owner of rental units, not a sublessor. Furthermore, she owns more than three rental units which are subject to the city's rent control laws. Accordingly, at this time, we need not respond to the hypothetical concerns raised in your letter. At a minimum, the effect of Section 121(3) is clear as to Ms. Watts. Therefore, we shall not change our previous conclusion that, based on Section 121(3) of the city

charter, and based on Regulation 18703 and Ferraro, Ms. Watts is situated differently from the public generally because she owns six rental units that are subject to the Berkeley rent control laws.

Our previous advice to Ms. Watts concerned a particular decision, the computation of annual rent adjustments. You now ask about Ms. Watts' ability to participate in other decisions of the Rent Stabilization Board. You have not focused your question on a specific decision pending before the Rent Stabilization Board. Therefore, we can provide only the following general guidance.

Conflict of interest questions must be analyzed on a case-by-case basis. With respect to each Rent Stabilization Board decision, Ms. Watts must consider two questions:

1. It is reasonably foreseeable that the decision will affect her real property?
2. If an effect is foreseeable, will that effect be material?

Foreseeability

If there is a substantial likelihood that an effect will occur, the effect is reasonably foreseeable. Certainty is not required; however, if an effect is but a mere possibility, it is not reasonably foreseeable. (Thorner Opinion, 1 FPPC Ops. 198 (No. 75-089, Dec. 4, 1975, copy enclosed.)

The Rent Stabilization Board decisions on general rent adjustments, registration fees and similar matters which affect landlords in general will typically have a reasonably foreseeable effect on Ms. Watts' economic interests. Based on the information you submitted with your letter, the Rent Stabilization Board also resolves disputes between individual landlords and tenants. The Rent Stabilization Board decisions serve as precedent for future cases. Thus, the decisions may indirectly affect Ms. Watts, even though her rental units are not the subject of the decision. In general, such decisions will have a reasonably foreseeable effect on Ms. Watts' real property if there is a similar claim pending, or likely to be filed, concerning one of her rental units. In contrast, if no similar claim is pending or likely to be filed against Ms. Watts, the decision would not foreseeably affect her real property interests.

Materiality

The Commission has adopted Regulations 18702, 18702.1 and 18702.2 (copies enclosed) for determining whether the reasonably foreseeable effect of a decision is considered material. Regulation 18702(b)(2) is the guideline which applies to most decisions affecting an official's real property. We discussed the application of Regulation 18702(b)(2) to Rent Stabilization Board decisions in our previous letter concerning Ms. Watts.

Regulation 18702.1(a)(1) is applicable when a person who has been a source of income to the official of \$250 or more in the preceding 12 months appears before the official in connection with the decision. A person appears before an official in connection with a decision when he or she, either personally or by an agent:

1. Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request;
2. Is a named party in the proceeding concerning the decision before the official or the body on which the official serves.

Regulation 18702.1(b).

For example, if one of Ms. Watts' tenants filed a claim with the Rent Stabilization Board, and Ms. Watts has received at least \$250 in rent payments from that tenant, Ms. Watts may not participate in the decision on the tenant's claim.

Finally, Regulation 18702.1(a)(4) applies when the effect of the decision on the official's real property would be to increase or decrease by \$250 or more the annual expenses the official will incur regarding her property. For example, this regulation applies to decisions affecting the registration fees paid by owners of rent-controlled units, mentioned in your letter. Pursuant to Regulation 18702.1(a)(4), Ms. Watts may participate in a decision concerning the registration fees, unless her total registration fee expenses would be increased or decreased by \$250 or more in a year. In other words, if the proposed change in the registration fees is less than \$41.67 per unit per year, Ms. Watts may participate in the decision.

If Ms. Watts has any further questions concerning specific decisions, she may contact us for additional advice.

Ms. Kathleen DeVries

Ms. DeVries is a tenant in a rent-controlled unit. For purposes of the Act, a leasehold interest, except for a periodic tenancy of one month or less, is an interest in real property. (Section 82034; Regulation 18236, copy enclosed.) Accordingly, if Ms. DeVries' tenancy is other than a periodic tenancy of one month or less, and its value is at least \$1,000,^{3/} Ms. DeVries could be disqualified from participating in certain decisions of the Rent Stabilization Board.

Ms. DeVries must consider three questions when analyzing her duties under the conflict of interest provisions of the Act:

1. Will the decision have a reasonably foreseeable effect on her financial interests?
2. If an effect is reasonably foreseeable, will the effect be material?
3. Is the effect distinguishable from the effect on the public generally?

Foreseeability

The discussion of foreseeability with respect to Ms. Watts also applies to Ms. DeVries. For example, if the Rent Stabilization Board is faced with a decision such as a general rent adjustment, which affects all tenants, an effect on Ms. DeVries is reasonably foreseeable. In contrast, if the Board's decision involves a claim filed by an individual tenant, an effect on Ms. DeVries is not reasonably foreseeable unless she has a similar claim pending or is preparing to file such a claim.

Materiality

For most cases, Regulation 18702(b)(2) contains the applicable materiality standard for decisions affecting Ms. DeVries. This regulation applies whenever the effect of a decision would be to increase or decrease the amount of rent tenants, in general, must pay.

If Ms. DeVries were to file a claim against her landlord with the Rent Stabilization Board, Regulation 18702.1(a)(4) would apply. If the reasonably foreseeable effect of that

^{3/} Regulation 18729 (copy enclosed) provides for the calculation of the value of a leasehold interest.

decision on Ms. DeVries' personal expenses or liabilities would be \$250 or more in a year, the effect is considered material.

Effect on the Public Generally

In the Overstreet Opinion, 6 FPPC Ops. 12 (No. 80-010, March 2, 1981, copy enclosed), the Commission found that tenants are a group large in numbers and diverse in nature, representing every occupation and interest group, and thus constitute a significant segment of the public generally. Accordingly, the Commission held that a tenant who was a member of the Berkeley Rent Stabilization Board could participate in decisions which will have a material financial effect on her interest in the property she rents, if those decisions will affect her interests in substantially the same manner as they will affect tenants in general in Berkeley. On the other hand, if the effect of the decision on her interest in real property will be distinguishable from the decision's effects on tenants in general, she should disqualify herself. (Overstreet, supra, at p.18.)

Based on Overstreet, we conclude that Ms. DeVries may participate in decisions, such as a general rent adjustment, which affect all tenants in Berkeley in substantially the same manner. Her participation is permitted even if the decisions would foreseeably and materially affect her economic interests. However, if the decision would have a special effect on Ms. DeVries' economic interests, different from the effect on tenants in general, and the effect is foreseeable and material, Ms. DeVries must disqualify herself from participating in the decision.

In your letter, you assert that it is unfair to consider tenants the "public generally" when landlords are denied that status. As we have previously discussed, the Commission made this distinction in the Ferraro and Overstreet Opinions. We emphasize that the distinction between landlords and tenants for conflict of interest purposes also is contained in Section 121(3) of the Berkeley City Charter.^{4/}

^{4/} In Overstreet, the Commission decided, based on specific provisions of the Berkeley rent control laws then in effect, that both landlords and tenants were the "public generally." The relevant provisions of the Berkeley rent control laws were amended significantly when the voters enacted Section 121(3) of the City Charter. Your arguments that landlord and tenant members of the Rent Stabilization Board should receive similar treatment under conflict of interest laws are best addressed to the voters of the City of Berkeley, who have the power to repeal Section 121(3) of the City Charter and reenact the prior law.

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If you have any further questions regarding this matter,
please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Kathryn E. Donovan

By: Kathryn E. Donovan
Counsel, Legal Division

KED:km
Enclosures

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June 15, 1987

California Fair Political Practices Commission
428 J Street, Suite 800
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Sacramento, California 95804-807

Subject: Berkeley Rent Control Ordinance, Measure G
(Ordinance No. 5467-N.S.)
Berkeley Charter Amendment N
(Elected Rent Board)

Attention: Kathryn Donovan FPPC File: No. 87-145

On May 26, 1987, INEZ WATTS and KATHLEEN DEVRIES filed a petition under the Political Reform Act for guidance as to their qualifications and disqualifications as members of Berkeley's Rent Board. Various documents not then available have now become so, and, with your permission, are submitted herewith. They have been given designations to conform with those of the Appendices previously submitted.

S) "Subchapter C. Standards for Individual Rent Ceiling Adjustment," the "indexing regulations."

T) Pallack v. Kaarto, Berkeley Rent Board proceeding: Case T-978
Interlocutory ruling of Hearing Examiner Lanny Jay supplementing ruling in Appendix O.

U) Hyde v. Bowers, Berkeley Rent Board proceeding: Case T-783
Decision on Appeal by Board members Florence McDonald, Kathi Pugh, and Carol Smith.

The significance of these documents is briefly stated.

The indexing regulations [Appendix S] -- adopted without landlord participation -- purport to adjust rental income to reflect inflation. But what they state is that "after July 1, 1987," rents may be adjusted "prospectively" so as to reflect "40%" of the cost-of-living increase since 1980, provided that the landlord "demonstrates" that increases are necessary. So that 17,000 rental units will require 17,000 highly-detailed applications! An elephantine procedure such as this led to invalidation of an

earlier rent-control law in Birkenfeld v. Berkeley (1978) 17 Cal. 3d 129.

The Commission, of course, does not pass upon the wisdom of these regulations. But it certainly may utilize them as evidence that their proponents are not disinterested in their repressive result.

Pallack v. Kaarto [Appendix T], a Rent Board hearing-examiner ruling, expands on the earlier ruling [Appendix O] so as to make clear that a subtenant who has never been accepted as such by the landlord, who has never paid any rent, and who has never had any rent demanded of her, nevertheless has "standing" under Berkeley's rent law to litigate the status of her "rent." And in this way confirms once again the tangible and substantial property right conferred by Berkeley's rent law upon eviction-proof tenants.


Hyde v. Bowers [Appendix U] is a Decision on Appeal, by Rent Board members, Florence McDonald, Kathi Pugh, and Carol Smith -- of whom the last two are tenants -- modifying the decision of the hearing examiner, reducing rent ceilings, and ordering a refund of \$2,320. By this means, Board members on appeal panels establish principles, create precedents, and provide guidance such that, in due season, they themselves may expect to become the beneficiaries of Board rulings: as happened when member Smith was awarded \$4,346.31 and had her rent reduced by \$109 per month. [See Appendix F].

We believe these added materials will assist the Commission in making its ruling.

Respectfully submitted,


INEZ WATTS


KATHLEEN DEVRIES


Charles F. Lawrence
Attorney